

3. Chibardun must allow the City to use poles, conduits and other structures free of charge (Section 13). In contrast, the Rice Lake Code imposes no comparable obligation upon GTE.
4. Chibardun must pay the City an "administrative fee" of \$10,000 for the drafting and processing of the License Agreement (Section 14) and reimburse the City for "any and all" costs the City incurs for review, inspection or supervision of Chibardun's activities under the Agreement or under "any other ordinances" for which a permit fee is not established. In contrast, GTE is subject only to the minimal excavation fee (which appears to be ten dollars) established under Section 6-2-3(b).
5. Chibardun must agree in advance to comply with any and all provisions that might be included in any future Rice Lake telecommunications ordinance, including any future right-of-way occupancy fee provisions (Section 15). In contrast, it is not clear whether such future ordinances will apply, in whole or part, to GTE.
6. Chibardun must provide to the City an irrevocable letter of credit in the amount of \$50,000 to ensure performance of all of Chibardun's obligations (Section 18). In contrast, the Rice Lake Code requires no similar letters of credit or performance bonds from GTE.
7. Chibardun must indemnify (Section 19) not only the City but also a much broader group of City employees, agents,

contractors and attorneys for a much broader range of activities relating to subsequent operations as well as construction, including claims resulting from their own negligence or contributory negligence and alleged injury from exposure to electromagnetic fields. In contrast, Section 6-2-4(c)(2) of the Rice Lake Code requires GTE to indemnify the City only against claims resulting from the negligence of GTE or GTE employees relating to the construction.

8. Chibardun must satisfy far greater and more expensive insurance obligations (Section 20) than those imposed upon GTE by Section 6-2-3(c):

<u>Coverage</u>	<u>Chibardun</u>	<u>GTE</u>
Bodily injury		
Per person	\$500,000	\$100,000
Per occurrence	\$1,000,000	\$300,000
Property injury	\$1,000,000	\$50,000
Umbrella liability	\$4,000,000	None

As a small company trying to enter the Rice Lake market to compete with the entrenched telecommunications monopoly of the much larger GTE, Chibardun already faces a formidable task. It simply cannot succeed or survive if the City insists upon imposing substantially more onerous and expensive regulatory and financial obligations upon it than upon GTE. Such obligations not only violate the "competitively neutral" and nondiscriminatory" criteria of Section 253(c) of the Communication Act, but also "effectively prohibit" Chibardun from providing telecommunications service in

Rice Lake in violation of Section 253(a) thereof.

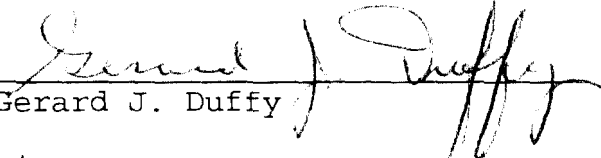
### CONCLUSION

Section 253(d) of the Communications Act orders the Commission to preempt the enforcement of any state or local statute, regulation or legal requirement that violates Section 253(a). Here, Chibardun has shown that the City's refusal to issue excavation permits for the construction of its proposed Rice Lake telecommunications system has prevented it from offering telecommunications services to Rice Lake businesses and residents during 1997-1998 and potential future periods. In addition, the City has attempted to force Chibardun to accept onerous regulatory and financial conditions that exceed the scope of traditional right-of-way regulation and that discriminate against Chibardun in favor of the existing GTE monopoly.

Therefore, the Commission is requested to preempt the City: (a) from insisting that Chibardun sign the City's proffered License Agreement as a precondition for the City's grant of the excavation permits which Chibardun needs to construct its proposed new Rice Lake telecommunications facilities; (b) from enforcing Ordinance No. 849, adopted August 26, 1997, to restrict the issuance of excavation permits for the construction of telecommunications facilities by newcomers attempting to compete with the existing Rice Lake monopoly; (c) from adopting and enforcing any future right-of-way ordinances placing larger fees and more onerous conditions and restrictions upon entities seeking to furnish

competitive telecommunications in Rice Lake; and (d) from otherwise engaging in practices which impose anticompetitive and discriminatory costs, delays and conditions upon Chibardun and others trying to bring telecommunications competition to Rice Lake.

Respectfully submitted,  
**CHIBARDUN TELEPHONE COOPERATIVE, INC.**  
**CTC TELCOM, INC.**

By   
Gerard J. Duffy  
Their attorney

Blooston, Mordkofsky, Jackson  
& Dickens  
2120 L Street, N.W.  
Washington, D.C. 20037  
(202) 659-0830

Dated: October 10, 1997

**EXHIBIT A**

Current - S. B. R.  
G. B. R.**CHAPTER 2-STREETS AND SIDEWALKS**

- S 6-2-1 Removal of Rubbish and Dirt From Sidewalks
- S 6-2-2 Sidewalk, Curb and Gutter Construction and Repair
- S 6-2-3 Excavations of Streets, Alleys, Public Ways and Grounds
- S 6-2-4 Regulations Governing Excavations and Openings
- S 6-2-5 Obstructions and Encroachments
- S 6-2-6 Street Privilege Permit; Moving Buildings
- S 6-2-7 Snow and Ice Removal
- S 6-2-8 Boulevard Areas
- S 6-2-9 Vaults
- S 6-2-10 Downspouts and Eaves of Buildings Not to Drain on Sidewalks.

**SEC. 6-2-1 REMOVAL OF RUBBISH AND DIRT FROM SIDEWALKS.**

No owner or occupant shall allow the sidewalk abutting on his premises to be littered with rubbish or dirt. If such owner or occupant shall refuse or fail to remove any such rubbish or dirt when notified to do so by the Common Council or Street Superintendent, the Council or Street Superintendent may cause the same to be done and report the cost thereof to the Clerk-Treasurer who shall spread the cost on the tax roll as a special tax against the premises, or such cost may be recovered in an action against the owner or occupant.

**SEC. 6-2-2 SIDEWALK, CURB AND GUTTER CONSTRUCTION AND REPAIR.**

- (a) **UNSAFE SIDEWALKS.** The Public Works Committee of the Common Council and the Street Superintendent are hereby authorized to determine which sidewalks in the City are unsafe, defective or insufficient and in need of repair or replacement and to formulate an annual program for ordering such sidewalks to be repaired, removed or replaced.
- (b) **COST OF REPLACEMENT AND REPAIR.** The expense of removal, replacement or repair of sidewalks shall be borne by the City and the property owner in accordance with a formula to be adopted by the Common Council for each year of sidewalk repair. It is the intention of this Section to determine the relative sharing of cost of sidewalk repair between the property owner and the City on a yearly basis.
- (c) **SPECIAL ASSESSMENT.** When the Council shall determine the cost sharing on the sidewalk repair each year, the property owner may pay his share or elect to have it placed on the tax roll as a special assessment with four (4) annual installments and with interest as provided by law.
- (d) **PERMIT REQUIRED.** No person shall hereafter lay, remove, replace or repair any public sidewalk within the City unless he is under contract with the City to do such work or has obtained a permit therefor from the Street Superintendent at least three (3) days before work is proposed to be undertaken. No fee shall be charged for such permits.

- (e) **CURB AND GUTTER.** All the foregoing provisions relating to replacement and repair of sidewalks shall be equally applicable to the replacement and repair of curb and gutter throughout the City. The present formula for new curb and gutter shall remain the same.
- (f) **REPAIR AND REPLACEMENT OF DOWNTOWN SIDEWALKS.** For purposes of this section, downtown sidewalks consist of any sidewalks on Main Street located between Messenger Street and Humbird Street. Whenever it is determined, pursuant to Section (a) hereinabove, that the downtown sidewalks are unsafe, defective, or insufficient and in need of repair or replacement, such sidewalks shall be replaced with exposed aggregate composition material. It is the purpose of this section to recognize that the downtown sidewalks are of a unique character; and to require that such downtown sidewalks retain their unique character composition.

**SEC. 6-2-3 EXCAVATIONS OF STREETS, ALLEYS, PUBLIC WAYS AND GROUNDS.**

- (a) **PERMIT REQUIRED.** No person, partnership or corporation, or their agents or employees or contractors, shall make or cause to be made any opening or excavation in any public street, public alley, public way, public ground, public sidewalk or City owned easement within the City of Rice Lake without a permit.
- (b) **EXCAVATION FEE.** The fee schedule, as established by the Common Council, shall be on file with the Street Superintendent.
- (c) **INSURANCE REQUIRED.** A permit shall be issued only upon condition that the applicant submit to the Building Inspector satisfactory written evidence that applicant has in force and will maintain during the time the permit is in effect public liability insurance of not less than \$100,000 per one person, \$300,000 for one accident and property damage coverage of not less than \$50,000.
- (d) **EXCAVATIONS.**
- (1) No person shall excavate upon any City land or on any private land upon which the City has an easement for utility use without permission from the Building Inspector. Complete plans of the area where the work is to be done shall be furnished to the City Street Superintendent and to the Board of Public Works or its designee.
  - (2) No permit shall be issued to any person unless the area to be utilized for the proposed work does not conflict with utility facilities.
- (e) **NOTICE OF EXCAVATION.** Any person who shall cause any excavation to be made in any street, alley way or other public way in the City, shall, before refilling such excavation, cause notice to be given to the Street Superintendent, or the Utility Superintendent, or the City Clerk-Treasurer, and shall not begin to refill until given permission to refill by the official who was given notice. When the excavation is refilled a like notice shall be given to one of the officials above named or a duly authorized agent of such department or departments that the filling of the excavation has been completed.
- (f) **RESURFACING.** Restoration and resurfacing shall be done at the expense of the permit holder.

09-15-1997 10:00AM FRU CHURCHILL EL  
REGISTRATION

## SEC. 6-2-4 REGULATIONS GOVERNING EXCAVATIONS AND OPENINGS.

- (a) **FROZEN GROUND.** No openings in the streets, alleys, sidewalks or public ways shall be permitted when the ground is frozen except where it is deemed necessary by the Street Superintendent or Utility Superintendent.
- (b) **MANNER OF EXCAVATION.** When opening any street surface, alley way or other public way, all material must be removed with the least inconvenience to the public, and all such materials must be so placed that they will admit free passage of water along the gutter. The backfilling must be compacted and all materials other than the surfacing material must all be put back in the trench or trenches dug. Sheathing must be used to prevent caving. When caving occurs, all the street surface thus disturbed must be restored in the same manner as though it were a trench excavation.
- (c) **PROTECTION OF PUBLIC.**
  - (1) Every opening and excavation shall be enclosed with sufficient barriers. Sufficient warning lights shall be kept on from sunrise to sunset. Such lights shall be spaced so as to give adequate warning of the existence of the opening and of piled excavated materials. One amber light to be placed at each end of an opening and others to be placed at intervals not to exceed ten (10) feet. No open flame warning pots shall be used. Except by special permission from the Street Superintendent, no trench shall be excavated more than two hundred fifty (250) feet in advance of pipe or conduit laying nor left unfilled more than five hundred (500) feet where pipe or conduit has been laid.
  - (2) All necessary precautions shall be taken to guard the public effectively from accidents or damage to persons or property through the period of the work. Each person making such opening shall be held liable for all damages, including costs incurred by the City in defending any action brought against it for damages, as well as cost of any appeal, that may result from the neglect by such person or his employees of any necessary precaution against injury or damage to persons, vehicles or property of any kind.
- (d) **REPLACING STREET SURFACE.** In opening any public street, public alley, public sidewalk, public way, public easement, or public ground, the paving materials sand, gravel and earth or other material moved or penetrated and all surface monuments or hubs must be removed and replaced as nearly as possible in their original condition or position and the same relation to the remainder as before. Any excavated material which in the opinion of the Street Superintendent is not suitable for refilling shall be replaced with approved backfill material. All rubbish shall be immediately removed. In refilling the opening, the earth must be compacted not more than four (4) inches in depth and each layer compacted, tamped or flushed to prevent after-settling. When the sides of the trench will not stand perpendicular, sheathing and braces must be used to prevent caving. No timber, bracing, lagging, sheathing or other lumber shall be left in any trench.
- (e) **NOTICE.** It shall be the duty of the permittee to notify the Street Superintendent and all public and private individuals, firms and corporations affected by the work to be done at least twenty-four (24) hours before such work is to commence. The Street

Superintendent shall also be notified at least four (4) hours prior to backfilling and or restoring the surface.

- (f) **VALIDITY OF PERMIT.** Unless the work shall be commenced within thirty (30) days of the issuance of the permit, the permit shall be void, and a new permit must be obtained and an additional fee charged. The Street Superintendent may extend the time limitation for good cause.
- (g) **EMERGENCY EXCAVATION.** In the event of an emergency any person, firm or corporation, owning or controlling any sewer, gas main, water main, conduit or other utility in or under any public street, alley easement, way or ground and his agents and employees may take immediate proper emergency measures to remedy dangerous conditions for the protection of property, life, health, or safety without obtaining an excavation permit, provided that such person firm or corporation shall apply for an excavation permit not later than the next business day.
- (h) **EXCAVATION IN NEW STREETS LIMITED.** Whenever the City determines to provide for the permanent improvement or repaving of any street, such determination shall be made not less than thirty (30) days before the work of improvement or repaving shall begin. Immediately after such determination, the Street Superintendent shall notify in writing each person, utility, department or other agency owning or controlling any sewer, water main, conduit or other utility in or under said street or any real property abutting said street, that all such excavation work in such street must be completed within thirty (30) days. After such permanent improvement or repaving, no permit shall be issued to open or excavate said street for a period of five (5) years after the date of improvement or repaving unless in the opinion of the Board of Public Works an emergency exists which makes it absolutely essential that the permit be issued.
- (i) **EXCEPTION.** The provisions of this Section shall not apply to excavation work done under the direction of the Street Superintendent by City employees or contractors performing work under contract with the City except that the safety precautions under Subsection (c) hereof shall be complied with.

#### **SEC. 6-2-5 OBSTRUCTIONS AND ENCROACHMENTS.**

- (a) **OBSTRUCTIONS AND ENCROACHMENTS PROHIBITED.** No person shall encroach upon or in any way obstruct or encumber any street, alley, sidewalk, public grounds, or land dedicated to public use, or any part thereof, or permit such encroachment or encumbrance to be placed or remain on any public way adjoining the premises of which he is the owner or occupant, except as provided in subsection (b).
- (b) **EXCEPTIONS.** The prohibition of subsection (a) shall not apply to the following:
  - (1) Signs or clocks attached to buildings which project no more than six (6) feet from the face of such building and which do not extend below any point ten (10) feet above the sidewalk, street, or alley.
  - (2) Awnings which do not extend below any point seven (7) feet above the street, sidewalk, or alley.
  - (3) Public utility encroachments duly authorized by State Law or by the Common Council.

EXHIBIT B

[6-2-3] (a)

**PERMIT FOR EXCAVATION OF STREETS, ALLEYS, PUBLIC WAYS AND GROUNDS.**

Excavation by [ ] Applicant [ ] City of Rice Lake

PERMIT #470

4665-9P00ZGR-D42

Name and Address of Applicant (Permittee)	Highway or Street
GENTEL CO. 20 SOUTH WILSON AVE RICE LAKE, WI. 54868	SOUTHWEST ST.
	Number of Excavations
	1
	Type of Excavations
	Plow
Street Address of Work Area	Proposed Land Use
SOUTHWEST ST.	PLATE BURIED CABLE
Telephone Number	Completion Date
715-234-5524	11-7-96

Location of Excavation

NORTH side of SOUTHWEST Street/Avenue 140 ft. of  
the intersection of \_\_\_\_\_ and \_\_\_\_\_

Legal description of area served SOUTHWEST ST. NORTH SIDE STARTINGEAST OF BOEHMER DR. 566 FT. AND BURYING FOR 140 FEET

Description of proposed work (Include special restrictions, intersection clearances, other details and reference sketches which will be attached).

\*Note: If the Excavation described above is not completed by the "completion date" specified or conditions listed under Validity of Permit in specifications, this permit is null and void and the Excavation shall not be constructed unless authorized through a subsequent permit.

Any Excavation shall be constructed in accordance with all requirements printed on the attached specifications, and any special conditions stated herein. The maintenance of the Excavation shall be the responsibility of the applicant.

Issuance of this permit shall not be construed as a waiver of the applicant's obligation to comply with any more restrictive requirements imposed by local ordinances.

Mary A. Schaeffer  
Signature of Applicant

11-1-96  
Date

APPROVED BY CITY OF RICE LAKE	Date	PERMIT NUMBER
<u>Mary S. Neuman</u>	<u>11/6/96</u>	<u>1780</u>
Distribution: Original (white) to City Clerk Copy (canary) to Applicant Copy (pink) to Street Department	See attached letter	PERMIT FEE \$ <u>10.00</u> Payable to Clerk Treas. City of Rice Lake

Applicant is authorized to proceed with such work in accordance with State of Wisconsin and City of

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**EXHIBIT C**

# City of Rice Lake

Rice Lake, Wisconsin 54858

May 23, 1997



Mr. Rick Vergin  
General Manager/Executive Vice President  
Chibardun Telephone Cooperative, Inc.  
110 North Second Avenue  
P.O. box 164  
Dallas, WI 54733

Office: [715] 234-7088  
Direct Line: [715] 234-1010  
FAX: [715] 234-6829

**RE: City of Rice Lake**

Dear Mr. Vergin:

I am writing in response to your May 2, 1997 letter to me regarding Chibardun Telephone Cooperative's (Chibardun) request for a cable television franchise to serve the City of Rice Lake (City). I would also like to address Chibardun's request for the street opening permits referenced in your May 21, 1997 letter (attached hereto). The City understands that Chibardun would like to begin construction of its facilities to provide both telecommunications and cable television services in June 1997.

## Cable Television Franchise

Regarding the cable television franchise, the City is concerned that Chibardun intends to construct a cable television system within the City's rights-of-way without first obtaining a cable television franchise. Under federal law, a cable operator does not have the right to use the public rights-of-way or easements until it has been granted a franchise by the local franchising authority. 47 U.S.C. § 541(b)(1). It is the franchise that authorizes the construction of a cable system over public rights-of-way and through easements 47 U.S.C. § 541(a)(2). The same is true under state law. Sec. 66.082(3)(b), Stats.

The City understands that portions of the telecommunications network that Chibardun intends to install to provide telecommunications services can also be used to provide cable television service. The City is open to discussing the construction issue with Chibardun and requests an explanation of what portions of the cable system need to be built when the telecommunications network is being constructed.

Before the City can act on Chibardun's request for a cable television franchise, the City requires additional information. In acting on a franchise request, the City has broad authority to determine whether the applicant can meet local needs and interests and may establish the necessary franchise requirements. Moreover, the City may, among other things, "require adequate assurance that

the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial, technical, or legal qualifications to provide cable service," 47 U.S.C. § 541(a)(4). The City cannot make these determinations on the basis of the limited information Chibardun has submitted. Accordingly, the City requests that Chibardun submit its proposal for providing cable service in the City of Rice Lake and supply the information requested on the "Initial Application Form" enclosed with this letter.

#### Construction of a Telecommunications Network

On May 20, 1997, Chibardun applied to the City for several street opening permits to begin construction of a telecommunications network for the provision of telecommunications services within the City of Rice Lake. The City is now reviewing the permit requests and intends to act on those requests in due course.

Chibardun should be aware that the City intends to develop and adopt a telecommunications ordinance regulating the use of public rights-of-way in the City by telecommunications service providers. It is the City's intent that this ordinance would apply to Chibardun with respect to the provision of telecommunications service within the City. The ordinance will do the following: (1) set out the terms and conditions governing the use of public rights-of-way; (2) require a right-of-way user to register with the City and provide information regarding the user's intended operation within the City; (3) impose insurance and indemnification requirements; and (4) require the user to enter into a written agreement to pay an occupancy fee designed to recover the cost of regulation.


In the meantime, the City would like to negotiate a permit and license agreement with Chibardun, which would be subject to the terms of the ordinance to be adopted later in the year. The Agreement would grant a permit and license to Chibardun to occupy and use the public rights-of-way to construct, operate and maintain a telecommunications network within the City. The Agreement would also set out the terms and conditions accompanying that grant and provide for the regulations of construction, operation, maintenance and use of the network. The City anticipates having a draft of the Agreement prepared by the first week of June.

To aid the City in the development of such an agreement, the City needs the following additional information from Chibardun: (1) a description of the proposed network; (2) a construction timetable; (3) a statement of the projected service dates; (4) a statement regarding the nature of the telecommunications services to be provided, operating territory, and proposed charges; (5) evidence that Chibardun has obtained the requisite approvals from the Public Service Commission of Wisconsin; and (6) a statement regarding the need to negotiate an interconnection agreement with GTE.

Letter to Mr. Vergin

The City looks forward to working with Chibardun. Please feel free to call me if you have any questions.

Sincerely,  
CITY OF RICE LAKE

A handwritten signature in black ink, appearing to read 'Curtis E. Snyder', written over the typed name.

Curtis E. Snyder  
City Administrator

### INITIAL FRANCHISE APPLICATION

An application for an initial franchise should be filed with the City Clerk and should contain the following information:

1. Name and Address of Applicant. The name and business address of the applicant, date of application and signature of applicant or appropriate corporate officer.
2. Technical Description. A technical description of the type of cable system proposed.
3. Technical Statement. A statement from the applicant that its proposed cable system and proposed services shall meet all applicable municipal, state and federal requirements for cable television systems.
4. Description of Proposed Operation. A general description of the applicant's proposed operation in the City of Rice Lake, including but not limited to business hours, operating staff, maintenance procedures, management and marketing staff complement and procedures, proposed line extension policy and plans for interconnection to the City's existing and future public access facilities.
5. Studies. A copy of any studies either performed or commissioned by the applicant indicating the applicant's likely penetration rates for service within the City of Rice Lake, and a copy of any other studies regarding the feasibility of the proposed cable system.
6. Construction Timetable, Estimate, and Costs. A proposed construction timetable, including proposed commencement and completion dates, and indicating the time frames for the provision of service to potential subscribers within the City of rice Lake. A statement of estimated construction costs and estimate number of miles of construction.
7. Schedule of Charges and Channel Line Up. A statement of the applicant's proposed schedule of charges for cable services and proposed channel line up.
8. Corporate Organization. A statement detailing the corporate organization of the applicant, if any, including the names and addresses of its officers and directors and the number of shares held by each officer and director.
9. Intra-Company Relationships. A statement describing all intra-company relationships of the applicant, including parent, subsidiary or affiliated companies.
10. Agreements and Understandings. A statement setting forth all agreements and understandings, whether written or oral, existing between the applicant and any other person, firm,

group, association or corporation with respect to any franchise to be forwarded to the applicant by the City of Rice Lake and the proposed cable television system.

11. Financial Projection. A ten-year operations pro forma which shall include the initial and continuing plant investment, annual profit and loss statements detailing income and expenses, annual balance sheets and annual levels of subscriber penetration. Costs and revenues anticipated for voluntary services shall, if presented, be incorporated in the pro forma, but shall be separately identified in the pro forma.
12. Existing Franchises. Disclose the following information regarding the applicant's existing franchises:
  - (a) Locations of all other franchises and the dates of ward of each location;
  - (b) Estimated construction costs and estimated completion dates for each system;
  - (c) Estimated number of miles of construction and number of miles completed in each system as the date of this application;
  - (d) Date for completion of construction as promised in the application for each system; and
  - (e) Schedule of rates and channel line ups.
13. Pending Franchises. Disclose the following information regarding the applicant's pending franchise applications:
  - (a) Location of other franchise applications and date of application for each system;
  - (b) Estimated dates of franchise awards;
  - (c) Estimated number of miles of construction; and
  - (d) Estimated construction costs.
14. Convictions. A statement as to whether the applicant or any of its officers or directors or holders of five percent or more of its voting stock has in the past ten years been convicted of or has charges pending for any crime other than a routine traffic offense and the disposition of each such case.

**EXHIBIT D**

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LAW OFFICES

BLOOSTON, MORDKOFKY, JACKSON & DICKENS

2120 L STREET, N.W.

WASHINGTON, D.C. 20037

(202) 659-0830

TELECOPIER: (202) 828-5568

May 23, 1997

PERRY W. WOOFER\*  
OF COUNSEL

EUGENE MALISZEWSKY, J.  
DIRECTOR OF ENGINEERING  
PRIVATE RADIO

SEAN A. AUSTIN  
DIRECTOR OF ENGINEERING  
COMMERCIAL RADIO

HAROLD MORDKOFKY  
ROBERT M. JACKSON  
BENJAMIN H. DICKENS, JR.  
JOHN A. PRENDERGAST  
GERARD J. DUFFY  
RICHARD D. RUBINO\*  
SUSAN J. BAHR  
D. CARY MITCHELL

ARTHUR BLOOSTON  
RETIRED

\*NOT ADMITTED IN D.C.

WRITER'S DIRECT DIAL NO.

(202) 828-5528

Franklin P. Ferguson, Mayor  
Curtis E. Snyder, City Administrator  
City of Rice Lake  
11 East Marshall Street  
Rice Lake, Wisconsin 54868

Re: CTC-Telecom  
Telecommunications Easements and CATV Franchise

Dear Mayor Ferguson and Mr. Snyder:

We are telecommunications counsel for CTC-Telecom (CTC) and Chibardun Telephone Cooperative, Inc. (Chibardun). CTC has asked us to review Mr. Snyder's letter of May 23, 1997 and the law governing its entry into the Rice Lake market as a competing provider of local exchange and cable television services. We are writing this letter to set forth the legal rights and standards which CTC hopes the City will recognize, and which CTC will pursue, if necessary, before the Federal Communications Commission (FCC) and the courts.

In brief, we believe that CTC has a right to same prompt grant of the easements (or street opening permits) that GTE, Marcus Cable and other utilities have historically received for construction of their Rice Lake systems, and that such easements may not lawfully be subjected to terms, conditions, occupancy fees and processing delays procedures different and more onerous than those imposed upon other local utilities. In addition, we believe that CTC has a right to the prompt grant of a competing cable television franchise, and that the imposition of unnecessary "studies," construction prohibitions and other regulatory delays constitute an effective and unlawful denial of the competing franchise.

CTC has been asked by Rice Lake residents to provide competing telecommunications and CATV services in the City. It needs to begin constructing its telecommunications and CATV facilities as soon as possible if it is going to be able to enter the Rice Lake market during 1997. As you are well aware, Wisconsin's outdoor construction season is short, and contracts need to be entered into right now if CTC is going to be able to provide competing telecommunications and CATV services this year. If CTC is forced to delay commencement of its services well into 1998, its competitive position will be substantially impaired and it may be forced to reconsider its plans to serve Rice Lake.

### Easement Issue

It is our understanding that the City historically has promptly and routinely approved applications by utilities for street opening permits or easements -- generally, rubber-stamping them as granted on the very day of their filing or within a day or two thereafter. Hence, Mr. Snyder's statement that the City is "now reviewing" CTC's permit requests and will act on them "in due course" is troubling because it applies a different standard to CTC and implies further processing delays.

Even more troubling is Mr. Snyder's statement that the City intends to develop a telecommunications ordinance regulating the use of City rights-of-way by telecommunications service providers (including the imposition of occupancy fees), and that the City will require CTC to negotiate and enter a "permit and license agreement" which would be subject to the ordinance to be adopted later. CTC has been told by Mr. Snyder that these new arrangements have come under consideration because CTC is coming to town. They have not been imposed upon GTE, Marcus Cable or other utilities when they entered the Rice Lake market. In fact, it appears that the City may be intending to impose the new ordinance and permit/license agreement only upon CTC, or that it may not be planning to make these new provisions equally applicable to the existing utilities.

Finally, Mr. Snyder's letter requests substantial information regarding the operation, maintenance and use of CTC's proposed network -- for example, CTC's proposed telecommunications services and charges, its receipt of requisite Wisconsin Public Service Commission (WPSC) approvals, and the need for it to enter into interconnection arrangements with GTE. These matters are within the jurisdiction of the FCC and the WPSC, and have no obvious relevance to the City's management of its rights-of-way. We are concerned that these questions constitute attempts by the City to impose prohibited barriers to CTC's entry into the Rice Lake market, and that they will further delay approval of the street opening permits needed by CTC.

Section 253(a) of the Communications Act (the Act) precludes state and local governments from prohibiting (or from imposing requirements which have the effect of prohibiting) the ability of any entity to provide any interstate or intrastate telecommunications service. Section 253(d) of the Act authorizes the FCC to preempt state and local requirements that serve as barriers to entry into telecommunications markets.

Section 253(c) of the Act recognizes the authority of state and local governments to manage public rights-of-way. However, Section 253(c) expressly requires states and localities to manage public rights-of-way in a **competitively neutral** and **nondiscriminatory** manner; and allows them to impose occupancy fees and other compensation requirements regarding such rights-of-way only if the compensation is: (a) fair and reasonable; (b) competitively neutral; (c) nondiscriminatory; and (d) publicly disclosed. In Classic Telephone, Inc., 11 FCC Rcd 13082 (1996), the FCC stated that the types of restrictions permitted by Section 253(c) are limited to matters such as: (1) regulating the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts; (2) requiring a company to place its facilities underground (rather than overhead) consistent with the requirements imposed on other utility companies; (3) requiring a company to pay fees to recover an appropriate share of increased street repair and paving costs that result from **repeated** excavation; (4) enforcing local zoning regulations; and (5) requiring a company to indemnify the local government against claims of injury arising from the company's excavation.

Here, the City appears to be imposing requirements, procedures and costs upon CTC that are different and far more onerous than those applicable to its established telecommunications and CATV competitors. Because it has sought to enter these markets at the request of the people of Rice Lake, CTC does not know whether the City intends to discriminate against it and impair its attempts to compete, and (if so) why it has taken this course. However, whether intended or not, the City's present easement delays and ordinance/agreement demands are competitively non-neutral and discriminatory in violation of Sections 253(a) and 253(c) of the Act. Moreover, the City's inquiries regarding CTC's services, rates, WPSC approvals and interconnection go beyond the limits of its right-of-way jurisdiction, and look like the types of attempts to impair or delay entry into a market that are prohibited by Section 253(a).

We hope that the concerns of CTC and the City can be readily and reasonably resolved; that CTC's requested easements can be promptly issued on the same terms, conditions and timetables enjoyed by existing Rice City utilities; and that CTC will be permitted to bring competitive telecommunications services and rates to Rice Lake residents. However, if CTC's requested permits/

easements are denied, delayed or impaired by onerous and discriminatory conditions or if CTC is forced to abide by ordinances, agreements and fees not equally applicable to other Rice Lake utilities, CTC will have no choice but to initiate an FCC preemption proceeding against the City.

### Competitive CATV Franchise

It is our understanding that CTC has had extensive discussions with the Rice Lake Cable Commission and City Council regarding its request for a franchise for a competing CATV system. It is also our understanding that CTC has agreed to accept a franchise substantially similar to Marcus Cable's existing 15-year, nonexclusive franchise; and that the only variation requested by CTC is a clarification that it would be able to construct the full, city-wide system over a reasonable three-year period. In the face of legal threats from Marcus Cable, the City has refused to allow CTC to present competitively-sensitive information regarding its service and pricing plans pursuant to procedures designed to preserve their confidentiality. Notwithstanding CTC's assertions that substantial delays would impair the prospects for CATV competition in Rice Lake, the City Council has earlier this month referred the matter to a consultant for "further study." Finally, Mr. Snyder's May 23, 1997 letter contains an "Initial Franchise Application" which CTC was, for the first time, asked to complete. We have only had a brief time to review this "application," but note that it appears to be a new document that Marcus Cable was never required to file and that was never previously furnished or mentioned to CTC.

We are pleased that Mr. Snyder's May 23, 1997 letter indicates a willingness to discuss the construction of CTC's proposed cable television system at the same time as its proposed telecommunications system. We note that the FCC has held that Section 621(b) of the Act allows pre-franchise CATV construction so long as a franchise is received prior to commencement of CATV operations. New Ulm Telecom, Inc., 10 FCC Rcd 2705 (Comm. Carr. Bur. 1995). Moreover, we believe that the City and its residents would not want to suffer the inconvenience of having rights-of-way excavated two times within relatively close proximity of each other with respect to the CTC project.

Section 621(a)(1) of the Act mandates non-exclusive cable franchises, and strictly limits the right of local authorities to reject franchise applications by competing cable operators. While local franchising authorities have limited rights to reject sham applications from entities attempting to extort "greenmail" from existing cable operators via overbuild threats, they must grant competing franchises to bona fide applicants which provide reasonable assurances of their ability to furnish cable service and which promise to supply adequate public, educational and governmental

access (PEG) facilities. Where the applicant is an experienced cable operator (like CTC) with a record of providing adequate cable service to other communities, franchising authorities may not lawfully deny or delay action upon its application for a competing CATV franchise.

Specifically, Section 621(a)(1) declares that "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." Section 635(a) of the Act allows prospective cable operators denied competing franchises to pursue judicial and equitable relief against franchise authorities in federal or state court.

Section 621(a)(4) of the Act specifies the matters which a franchising authority may consider in awarding a competing cable franchise. The franchising authority:

(A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;

(B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and

(C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

The (B) and (C) limitations were added by the 1992 Cable Act to permit franchising authorities to deny obvious "greenmail" applications. The legislative history of Section 621(a) indicates:

The Committee further notes the existence of "greenmail" as an impediment to the number of secondary cable systems. In a "greenmail" scenario, the aim of the overbuilder is not to build and run a competing system but to receive payment from the existing operator in exchange for exiting the market. Thirty percent of the overbuild franchises awarded are never built because the incumbent operator agrees to buy the overbuilder out before it goes into operation. The Committee notes its disapproval of such "greenmail" practices because they are harmful to legitimate cable operators, and, ultimately, to consumers, who lose the potential benefits of competition and whose cable rates may be affected by the cable operator's payment to the "greenmailer." House Report 102-628 (102d Congress, 2d Session), p. 45.

Where there is no evidence or likelihood of a "greenmail" attempt, Section 621(a) requires local authorities to grant non-exclusive, competitive franchises to all bona fide applicants; and to let the marketplace determine the economic success of competing

operators. Put simply, where residents of a community have a choice of two or more CATV operators, the franchising authority has no need to regulate CATV service or rates, or to engage in lengthy studies of the proposed services and rates of new competitors. In fact, Section 623 of the Act prohibits federal or local rate regulation where effective competition exists; and will preclude City and FCC rate regulation of CTC (from the outset) and of Marcus Cable (as soon as CTC serves 15 percent of Rice Lake's households).

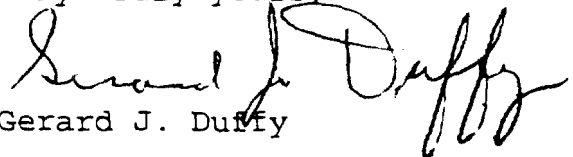
Where an applicant has a record of constructing and operating CATV facilities in other communities and of providing adequate CATV service and PEG facilities in other communities, there are no reasonable grounds upon which a franchising authority can refuse to award (or unreasonably delay award of) a competing franchise. Here, the City can readily determine from the Chibardun-CTC organization's existing CATV operations that CTC possesses the financial, technical, or legal qualifications to provide adequate cable service and PEG facilities in Rice Lake, and that CTC is a bona fide operator rather than a "greenmailer." Given that Marcus Cable holds a nonexclusive franchise and that the Act mandates the grant of competitive franchises, it is neither necessary nor lawful for the City to delay the onset of CATV competition for months or years while its consultant "studies" the matter.

Marcus Cable's protests appear to be a transparent attempt to delay or prevent CATV competition, and the loss of a large portion of its dissatisfied Rice Lake customers. Whereas the public disclosure of service and rate plans by competing applicants was appropriate during the period when the City was considering the award of the first Rice Lake CATV franchise, the public disclosure of CTC's plans at this time would give Marcus Cable a substantial competitive advantage and headstart during the period that CTC is obtaining its franchise and constructing its system. Marcus Cable's "concern" regarding the potential for cross-subsidization of CTC's CATV operations by its "monopoly" telephone operations are wholly spurious, because: (a) CTC's Rice Lake telephone operations will not be a monopoly able to increase the rates of "captive" telephone ratepayers at will, but rather will be competing with the established services of the much-larger GTE; and (b) CTC is required by the FCC, the WPSC and the Rural Utilities Service to keep separate the revenues and costs of its telephone and CATV operations. Marcus Cable's request for concurrent franchises would permit competitors to enter the market on equivalent terms only every fifteen years when its own franchise came up for renewal. Finally, Marcus Cable's opposition to CTC's proposed three-year construction period disregards the facts that its predecessor WFRV Television, Inc. did not build its CATV system in a day, and that Section 621(a)(4) of the Act gives cable operators a "reasonable period of time to become capable of providing cable service to all households in the franchise area."

CTC believes that the City has more than sufficient information at this time to grant its requested competing CATV franchise, and that a prompt grant will not only comply with federal law but also bring Rice Lake residents the service and pricing benefits of a competitive CATV market at an early date. If the requested competing franchise is denied or continues to be unreasonably delayed, CTC will pursue judicial and equitable relief in federal or state court.

If you have any questions regarding this matter, please feel free to contact me.

Very truly yours,

  
Gerard J. Duffy

cc: Members of Rice Lake City Council  
Curtis E. Snyder, City Administrator  
Herman Friess, City Attorney  
William M. Conley, Esq.